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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Universal Premium Acceptance Corporation

Serial No. 75/777,087

Timothy J. Feathers of Stinson Morrison Hecker LLP for
Universal Premium Acceptance Corporation.

Michael Webster, Trademark Examining Attorney, Law Office
102 (Tom Shaw, Managing Attorney).

Before Chapman, Holtzman and Drost, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Universal Premium Acceptance Corporation (a Missouri
corporation) has filed an application to register on the
Principal Register the mark shown below

e-PFA

for "electronic transmission of insurance premium financing information" in International Class 38.¹ The application was filed on August 16, 1999, based on applicant's claimed date of first use and first use in commerce of April 26, 1999.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its identified services, so resembles two prior registered marks (both on the Principal Register) owned by two different entities: (1) PFA EXPRESS for "commercial premium finance administrative services in the nature of providing financial rates and terms, for use by others" in International Class 36;² and (2) the mark shown below

EPfa

for "mortgage lending services" in International Class 36,³ as to be likely to cause confusion, mistake or deception.

¹ Informationally, various electronic transmission services are generally classified in International Class 38.

² Registration No. 2,054,143, issued April 22, 1997 to First Premium Services, Inc., Section 8 affidavit accepted, Section 15 affidavit acknowledged. The term "express" is disclaimed.

³ Registration No. 2,479,100, issued August 21, 2001 to DePfa Deutsche Pfandbriefbank AG.

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested.

We affirm the refusal to register as to both cited registrations. In reaching this conclusion, we have followed the guidance of the Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The means of distribution and sale, although certainly relevant, are areas of peripheral inquiry. The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks."). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of the services involved in this case, and we note that the question of likelihood of confusion in Board proceedings regarding the registrability of marks, must be determined based on an

analysis of the goods or services identified in applicant's application vis-a-vis the goods or services recited in the registration(s), rather than what the evidence shows the goods or services actually are. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N. A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Further, it is a general rule that goods or services need not be identical or even competitive to support a finding of likelihood of confusion. Rather, it is enough that the goods or services are related in some manner or that the circumstances surrounding their marketing are such that they would likely be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they emanate from or are in some way associated with the same producer or that there is an association between the producers of each party's goods or services. See *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992); and *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Applicant's service of providing insurance premium financing information is limited only in that it is provided by electronic transmission; but there is otherwise

no restriction as to channels of trade or consumers. The cited registration for the mark PFA EXPRESS which is registered for "commercial premium finance administrative services in the nature of providing financial rates and terms, for use by others" is for essentially the same service as that identified by applicant in its application, namely, providing insurance premium financing information, which could and presumably would include financial rates and terms.⁴

Applicant asserts that "the services of both Applicant and First Premium are provided to commercial entities in the insurance industry," but argues that the primary consumers of applicant's services are insurance agents and brokers, while this cited registrant's primary consumers are insurance companies themselves. (Brief, pp. 7-8.) This argument regarding different consumers is not persuasive in light of the respective identifications of services, which are not so limited.

We disagree with applicant's conclusory statement that because applicant could not find any use of this registrant's mark PFA EXPRESS on the Internet, applicant

⁴ The "premium finance administrative services" within this cited registrant's identification are further specified by the phrase "in the nature of providing financial rates and terms." Applicant has not argued that it does not provide financial rates and terms.

had established that the mark is not used in any on-line context. Applicant provided no information as to the extent or the parameters of its search for this registrant's mark on the Internet. In any event, there is no restriction in this registrant's identification of services stating that it will not offer its services through the Internet.

With regard to applicant's services vis-a-vis the second cited registrant's "mortgage lending services" (offered under the mark EPfa), we find that these are closely related services. While the specific services are different, the record contains several third-party registrations, based on use in commerce, listing both of these types of services in connection with the same marks. See, for example, Registration No. 1,872,759 for "... insurance premium financing services, ... mortgage lending services, ..."; Registration No. 1,939,383 for "providing financial services, namely, mortgage brokerage services and mortgage banking services and insurance premium financing,..."; and Registration No. 1,635,683 for "... insurance premium financing services, ... savings account and mortgage lending services,"

When considering the third-party registrations submitted by the Examining Attorney, we are aware that such

registrations are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them. Such third-party registrations nevertheless have some probative value to the extent they may serve to suggest that such services are of a type which emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, footnote 6 (TTAB 1988).

The Examining Attorney also submitted several excerpted stories retrieved from the Nexis database to show that mortgage lending services and insurance premium financing services are frequently available from a single source, such as the following examples:

Headline: Letters to the Editor:
Herman Dickey, Vice president of
marketing, PMI Mortgage Insurance Co.,
San Francisco
... Since premium financing burst on
the mortgage scene from 12 to 14 months
ago, popularity of these programs has
taken off.
...
All mortgage lenders (but particularly
mortgage bankers) have been hard-
pressed to compete with "No MI
[mortgage insurance]" programs.
Premium financing represents the only
viable response these lenders have to
such programs. "National Mortgage
News," October 24, 1988;

Headline: Latino Thrift Beefs Up
Subprime Unit's Staff
... In addition to subprime mortgage
lending, the company does auto
financing and auto insurance premium
financing. "The American Banker,"
April 10, 1997;

Headline: Ex-New Yorker Finds Good
Climate For Convertible Notes in
California
... The bank concentrates on asset-
based financing, insurance premium
financing, mortgage banking and
construction lending. "The American
Banker," February 16, 1988; and

Headline: Consumer Report: Bought by
Bank of New England
... The deal is seen as beneficial to
both Consumers and Bank of New England.
The immense resources of the larger
bank will give Consumers deeper
pockets, allowing it to rebuild
following last year's loss. Consumers
has divested all but three of its
principal subsidiaries, retaining a
secondary mortgage company, a real
estate development firm and an
insurance premium financing company.
"Business Dateline," April 14, 1986.

Based on the evidence of record, we find that
applicant's services (insurance premium financing
information provided via electronic transmission) are
closely related to each of the two cited registrant's
respective services (commercial premium financial
administrative services in the nature of providing
financial rates and terms, and mortgage lending services).

We do not find any significant differences in the channels of trade or purchasers for each of the three identified services. While one of the registrations limits the services to "commercial" premium financing information, applicant's identification is not so limited and hence encompasses the "commercial" information offered by that registrant. And it has been shown that insurance premium financing and mortgage lending services are offered to the same purchasers through some of the same channels of trade. Therefore, the trade channels and purchasers at the very least overlap.

Applicant's limitation to "electronic transmission" of such information does not compel a different result, as it is very plausible in today's business world that much information in any of the identified services is or could be transmitted electronically.

Applicant also argues that the purchasers of these respective services are commercial entities with sophisticated purchasing personnel who are able to distinguish between the marks e-PFA and PFA EXPRESS and EPfa. Even assuming, arguendo, that the purchasers of insurance premium financing information services, the services of providing financial rates and terms, and mortgage lending services are all sophisticated,

knowledgeable consumers, "even careful purchasers are not immune from source confusion." See *Wincharger Corporation v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999); and *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). See also, *In re Hester Industries, Inc.*, 231 USPQ 881, 883 (TTAB 1986) ["While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products"]. That is, even relatively sophisticated purchasers of these services are likely to believe that the services come from the same source, if offered under the involved substantially similar and arbitrary marks. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and *Aries Systems Corp. v. World Book Inc.*, 23 USPQ2d 1742, footnote 17 (TTAB 1992).

Turning next to a consideration of the marks, applicant contends that its mark e-PFA (as shown above) and PFA EXPRESS are "markedly distinct marks in terms of sight, sound and appearance." (Brief, p. 5.) Specifically applicant contends that the "e" in its mark relates to "electronic" commerce, while the term "express" in the

first cited mark relates to something provided in a fast manner; that the letters "PFA" in its mark are an acronym for "premium financing agreements," while the same letters in the first registrant's mark relate to "premium financing administration"; and that the cadence and rhythm of these two marks is very dissimilar.

The Examining Attorney contends that applicant's mark and PFA EXPRESS are "nearly identical" in sight, sound and commercial impression (brief, p. 5); that the dominant portion of each of these two marks is PFA; and that, considering the marks as a whole, the addition of the descriptive letter "e" and the descriptive term "express," respectively, does not negate the similarity of the overall commercial impression of these marks.

We agree with the Examining Attorney that the marks e-PFA and PFA EXPRESS are similar in sight, sound, connotation and overall commercial impression. The more arbitrary and dominant portion in each mark is the letters "PFA." It is, of course, well settled that marks must be considered in their entirety. However, our primary reviewing Court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a

particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

Moreover, the minor differences are not likely to be recalled by purchasers seeing the marks at separate times. Under actual market conditions, consumers do not have the luxury of a side-by-side comparison of the marks; and further, we must consider the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. Thus, the purchaser's fallibility of memory over a period of time must also be kept in mind. See Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991), aff'd unpub'd (Fed. Cir., June 5, 1992).

With regard to the connotation of these two marks, applicant's assertion that the letter "A" in "PFA" means or connotes "agreements" in applicant's mark, but it refers to "administration" in the PFA EXPRESS mark is unsupported by any evidence of consumer perception of the letters "PFA" as

different acronyms relating to premium financing agreements or premium finance administration; and we are not convinced that the purchasing public would make such a distinction.

Further, during the prosecution of applicant's application, the Examining Attorney inquired as to the meaning of the letters PFA in the relevant trade or industry, and applicant responded that it used the letters to refer to premium financing agreement, but that those terms had no particular significance in the relevant trade or industry. (Applicant's response, filed December 12, 2000, p. 4.)

Consumers may well believe that applicant's mark e-PFA simply refers to a modern "electronic" version of the cited registrant's mark PFA EXPRESS.

In comparing applicant's mark e-PFA to the second cited registered mark EPfa, we find that these marks are similar in sound, appearance and overall commercial impression. There is no evidence as to the connotation of the registered mark. Applicant argues that the registered mark is "by all accounts a trade name of a German commercial mortgage company." (Brief, pp. 10-11.) However, applicant is incorrect as the name of this registrant is DePfa Deutsche Pfandbreifbank AG. In any event, there is nothing to indicate that EPfa would be

perceived as this registrant's trade name. Again we take into account purchasers' fallible memories. In addition, when spoken, this registered mark could be pronounced as "e-pfa" (i.e., "electronic - pfa") or as a two syllable term "ep-fa." There is no "correct" pronunciation of a trademark. See *In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969); *In re Lamson Oil Co.*, 6 USPQ2d 1041 (TTAB 1987); and *In re Energy Telecommunications & Electrical Association*, 222 USPQ 350 (TTAB 1983).

Finally, although applicant's attorney has represented that there have been no instances of actual confusion since applicant commenced use of its mark in April 1999, such unsubstantiated statement is entitled to little weight. *Majestic Distilling Co.*, supra, 65 USPQ2d at 1205 ("With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value."). Importantly, in this case, the registered "EPfa" mark is based on Section 44 of the Trademark Act, and in any event, there is no evidence of applicant's and either of the cited registrants' geographic areas of sales, or the amount of the sales under the respective marks. Further, there is no information from the registrants. In any event, the test is likelihood of confusion, not actual

confusion. See Weiss Associates Inc. v. HRL Associates Inc., supra; and In re Kangaroos U.S.A., 223 USPQ 1025 (TTAB 1984). That is to say, the absence of evidence of actual confusion is offset by the absence of evidence that there has been a substantial opportunity for actual confusion to have occurred (i.e., evidence of an overlap in the respective actual trade channels). In these circumstances, we cannot conclude that the apparent absence of actual confusion is entitled to significant legal weight in the likelihood-of-confusion analysis. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 (TTAB 1992).

Decision: The refusal to register under Section 2(d) is affirmed as to both cited registrations.